DIVERSITY REMOVAL WHERE THE FEDERAL COURT WOULD NOT HAVE ORIGINAL JURISDICTION: A SUGGESTED REFORM

Under some circumstances, a federal district court has removal jurisdiction in diversity cases where it would not have had original jurisdiction over the action, *i.e.*, when one of the defendants is a cocitizen with one or more of the plaintiffs. The present provision governing such cases, section 1441(c) of the Judicial Code,[1] is unsatisfactory and should be repealed in favor of a provision submitted by the American Law Institute as a part of its proposed changes in the Judicial Code.[2]

The reason traditionally given for diversity jurisdiction is the fear that the courts of one state may discriminate against the citizens of another state.[3] Today a variety of other justifications is offered, none of which presents a compelling reason for the continuation of diversity jurisdiction.[4] Yet, since the availability of diversity jurisdiction may explain why there is no overriding fear of local prejudice and because diversity is a part of our judicial fabric[5] embodied in the Constitution, there is little chance that it will be abolished. Therefore, inquiry into the underlying considerations which should govern the exercise of diversity jurisdiction is both necessary and useful. Under each of the various theories (even the one based on the notion that the federal courts are intrinsically better than state courts)[6] the most favored candidate for diversity jurisdiction is that defendant who might be prejudiced in a state court due to his nonresident status.

In removal cases involving nonfederal issues the purpose of federal diversity jurisdiction becomes a particularly important question, since there is a direct exertion of federal power upon a state institution when a federal court acts to deprive a state court of its jurisdiction. In addition to depriving the plaintiff of his chosen forum, removal in cases involving partly diverse defendants can deprive the nondiverse defendant of his right to have the case heard in the courts of his own state.[7] The exercise of such power should rest upon the vindication of a clear federal interest in the case.

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[1] 28 U.S.C. § 1441(c) (1964).

[2] ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft, Part I, 1965) [hereinafter cited as ALI STUDY].

[3] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 892 (1953).

[4] See ALI STUDY 50. *Contra*, Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963). For a discussion of alternative justifications of diversity jurisdiction see *Other Suggested Rationales for Diversity Jurisdiction*, in ALI STUDY (Appendix A).

[5] See cases annotated in 28 U.S.C.A. § 1441 (Supp. 1964). Since 1948 there have been nearly 200 reported cases involving § 1441(c).

[6] ALI STUDY 48.

[7] 28 U.S.C. § 1441(c) (1964): "the district court may . . . in its discretion . . . remand all matters not otherwise within its original jurisdiction."

If the court chooses not to remand the nondiverse defendant's cause of action, there is no practical recourse for him, and the case will be tried in the federal court.

The present section of the Judicial Code which deals with removal in cases involving partially diverse defendants is 1441(c).[8] It explains how to determine whether such removal should be allowed in terms somewhat divorced from any coherent policy reflecting a clear federal interest. The provision reads as follows:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.[9]

An analysis of this section shows that it is essentially an "if-then" statement. When the court finds the "if" portion of the statement to be satisfied, *i.e.*, when there are "separate and independent causes of action" present, it can proceed to apply the "then" portion of the statute. The statute gives no indication, however, as to how the crucial operative "if" words, "separate and independent," are to be defined or what policies are to be followed or recognized in the process.

Thus in applying this section the courts presently do not have to reach the fundamental question of whether the defendant is of the type who should be given the protection of removal to the federal courts. They need only determine whether there is a "separate and independent claim or cause of action" which, if sued upon alone, would involve completely diverse plaintiffs and defendants.[10] That determination, made by resolving a procedural problem revolving around the nature of a cause of action, is governed by considerations not directly related to the central issue of diversity jurisdiction—protecting the prejudice-vulnerable defendant.

The reason for this lack of policy direction and the resultant procedural nature of the operative question posed by section 1441(c) may be found in the provision's history. Section 1441 replaced section 71, which read in part as follows:

> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States,

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[8] See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 105 (Wright rev. ed. 1960); 1A MOORE, FEDERAL PRACTICE ¶ 0.163 (2d ed. 1965); WRIGHT, FEDERAL COURTS § 39 (1963); Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 MINN. L. REV. 1 (1961); Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423 (1953); Moore & VanDercreek, *Multi-party, Multi-claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489 (1961).

[9] 28 U.S.C. § 1441(c) (1964).

[10] See, *e.g.*, American Fire & Cas. Co. v. Finn, 341 U.S. 6, 11 (1951); McLeod v. Cities Serv. Gas Co., 233 F.2d 242, 246 (10th Cir. 1956); Roby v. Maine Cent. R.R., 243 F. Supp. 153 (D.N.H. 1965); Eller v. M.L.D. Trust, 241 F. Supp. 800 (D. Mont. 1965).

> and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States . . . . And where a suit is now pending or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court . . . when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause.[11]

The latter portion of this provision was apparently aimed at allowing removal whenever local prejudice could be demonstrated[12]—a demonstration which could be exceedingly difficult if not impossible. As Mr. Justice Frankfurter has noted,[13] the local prejudice which is feared is not of the type which lends itself to ready detection.[14] This will be particularly true if the district judge involved shares an unconscious commitment to local

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[11] Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1094.

[12] See 1A MOORE, FEDERAL PRACTICE ¶ 0.159, at 443 (2d ed. 1965).

[13] Burford v. Sun Oil Co., 319 U.S. 315, 336-37 (1943) (dissenting opinion):

> The reasons which led Congress to grant . . . [diversity] jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state. Thus, the basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts.
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> That is the theory of diversity jurisdiction. Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness . . . are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction.

[14] This Comment excludes consideration of cases involving racial prejudice, since they are in a sense an abnormal strain on the system and should not be considered in trying to determine how a general system will operate under normal conditions. If the only prejudice to be feared is that which is so strongly felt and clearly wrong, then the maintenance of a system of diversity jurisdiction cannot be founded upon it, since the problem lends itself to less subtle solutions and more direct action. The need for diversity jurisdiction must be founded in the need to avoid exposing out of staters to the less keenly felt prejudice which springs from adherence to and acceptance of ordinary local norms and which would be virtually undetectable in judicial deliberations.

social values which are at the root of subtle discrimination against outsiders.[15]

The pattern of the cases which arose under section 71 supports the notion that the reaction of the bar was to avoid the difficult task of demonstrating discrimination.[16] Counsel applied themselves diligently to the task of finding "separable controversies." Since this inquiry focused attention on a neutral issue of procedure, it was easier for the courts to deal with than was the more relevant but more embarrassing question of whether the court was in fact prejudiced. This latter problem was very likely avoided by the bar for another intensely practical reason. Defendants remove and are gone, leaving behind counsel who must then practice before the courts they have called "prejudiced."

What happened under section 71, then, is clear. Judicial attention and effort were focused not on the problem of whether the defendant should be allowed to remove because he faced a prejudiced court, but upon the nature of the plaintiff's pleading. Thus the plaintiff's characterization of the case, which is governed by factors generally unrelated to diversity removal, tended to control its disposition on that question, since if the complaint set up some kind of "separable controversy" between plaintiff and defendant, the court would allow removal.[17] Section 1441(c) was to follow the pattern of section 71 in looking to the plaintiff's pleading to determine whether removal should be allowed.[18]

If removal jurisdiction is to be administered on an intelligible, consistent basis, the position of the defendant seeking removal should be the central element of concern. The law should directly consider his eligibility to remove unhampered by procedural notions such as the "independence" of the plaintiff's various claims.[19] If the defendant becomes the focal point

[15] Even where the district judge shares local values which might lead to discrimination, removal improves the position of the prejudice-vulnerable defendant. He is given the protection of a broader jury selection, the Federal Rules of Civil Procedure, and a judge whose duty is to the central government. This last factor may well overcome the personal bias of a district judge who might, nevertheless, be unable to detect similar bias on the part of his brothers on the state bench.

[16] See Pullman Co. v. Jenkins, 305 U.S. 534 (1938) & cases cited therein at 538; Gainesville v. Brown-Crummer Co., 277 U.S. 54 (1927); *cf.* St. Paul Indem. Co. v. Cab Co., 303 U.S. 283, 286 (1938) (discussion of history of removal without mention of discrimination clause of old § 71).

[17] See, *e.g.*, Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227 (5th Cir. 1945).

[18] Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir.), *cert. denied*, 355 U.S. 907 (1957) (plaintiff chose not to assert federal claim); Roby v. Maine Cent. R.R., 243 F. Supp. 153 (D.N.H. 1965) (plaintiffs brought separate suits which could have been joined); Garroutte v. General Motors Corp., 179 F. Supp. 315 (W.D. Ark. 1959) (plaintiff's motive in shaping pleadings irrelevant); Wade v. New York Fire Ins. Co., 111 F. Supp. 748 (E.D. Wash. 1953) (court would not look at affidavits; pleading controlled for removal purposes).

[19] This is not to say that the "independence" of the plaintiff's claims is wholly unrelated to whether or not removal should be allowed, see note 23 *infra*, but such an inquiry is an attack on the rear of the problem. The defendant's position may be approached through the plaintiff's statement of it; however, such an approach seems to call for confusion of the issues involved, and leads to concentration on the *method* of determining how removal should be granted as an end in itself, losing sight entirely of the defendant, as has been the case with § 1441(c).

of decision, present inconsistencies in result could be resolved,[20] because the same type of defendant will be allowed to remove in all instances, regardless of the procedural setting in which he is involved.

Moreover, by focusing on the defendant's position relative to the court in which he is to appear, the statute would provide a policy to guide the courts in defining all the operative statutory words, and the central question posed by the "if-then" statement would become related in a direct way to the underlying problem—the prejudice-vulnerable defendant.

It appears that the nature of the judicial process is such that without the aid of explicit statutory standards the courts are incapable of developing such a nonprocedural, defendant focused standard for removal cases involving partial diversity. Without such standards it seems likely that the courts, abetted by the litigants, will always tend to do as they did with section 71, that is, concentrate on a procedural issue (separability) and let the direct prejudice problem fade into obscurity. No strongly felt impetus presses the courts into allowing diversity removal, while there is a reason, even if an unarticulated one, for inertia. In any given case, aside from the difficulty of proving prejudice, one judge will be loathe to accuse another of being so influenced as to cloud an impartial judicial determination, particularly when the state-federal relationship is involved. For courts thus to accuse one another, no matter how well disguised the accusation may be, certainly would not be considered by any judge to be in the best interest of the judicial system as a whole.[21]

This is not to say that such local prejudice is not operative; it is merely to argue that the courts will not, because they cannot, find it to be so. The determination must come from outside the judicial system; the

[20] See Lancer Indus. Inc. v. American Ins. Co., 197 F. Supp. 894 (W.D. La. 1961). *Compare* Hafif v. Caledonian-American Ins. Co., 127 F. Supp. 639 (S.D.N.Y. 1955) (although liability of six insurers several, plaintiff's injury unitary, remanded), *and* Compressed Paper Box Corp. v. Fidelity-Phenix Fire Ins. Co., 124 F. Supp. 561 (D. Conn. 1954) (separate contracts covering separate hazards, but damage caused by single storm, remanded), *with* Breslerman v. American Liberty Ins. Co., 169 F. Supp. 531 (E.D.N.Y. 1959) (action under separate policies covering seperate risks, removal allowed), *and* Baltimore Gas & Elec. Co. v. United States Fid. & Guar. Co., 159 F. Supp. 738 (D. Md. 1958) (pro rata but separate policies, damages from an explosion, removal allowed).

The inconsistency spoken of is that which results when the same type of defendant (in terms of vulnerability to prejudice) is allowed to remove in one case and not allowed to do so in another under similar circumstances. In the cases noted, precisely the same type of defendant is allowed to remove on the one hand, and is remanded on the other, simply because of the procedural context within which he finds himself due to the manner in which the plaintiff sets forth his claim. *Cf.* cases cited note 18 *supra.* This is not to say that the cases are inconsistent within their own terms. Insofar as "separate and independent" claims are concerned they are close cases, leading to nice distinctions which offer a rationale for the result reached. It seems clear, however, that such internal consistency is not sufficient to justify the exercise of the removal power in a manner which is insensitive to the factor which led to its creation, the prevention of discrimination against the out of state defendant.

[21] Such accusations could be extremely damaging to the prestige, and, perhaps, the power of the state courts involved. And if the state courts counter attacked, by whatever means available, a further depreciation of respect for the judiciary could take place. To question specifically the fairness of one court in ordinary matters of litigation is to cast suspicion on the fairness of all.

courts here need to be told not only what is to be done but when, in direct, definite terms which can be applied to any given situation. The result in a given case would be merely one of a class of results which would not cast any aspersions upon the particular court involved.

When the courts and bar turned to the "separable controversy" portion of section 71 and made it the focal point of removal cases, it seems clear that they were striving to reach a concrete standard by means of a satisfactory definition of "separable."[22] Quite possibly the reason that they failed was that the problem was being approached from the wrong—the plaintiff's—end. There is certainly a relationship between the plaintiff's statement of his case and the status of the defendant relative to his eligibility for removal,[23] but to attack the problem in this way rather than head on, looking directly at the defendant, seems to invite litigation.

It appears that it was this shift in focus from the basic policy question to a related procedural problem which determined the form section 1441(c) took. As the bench and bar struggled with the concept of "separable controversies" they ceased to ask, at least explicitly, whether the removal was justified in terms of the defendant's position, and became totally absorbed in the interesting technical problem of defining "separability." The result was a growing number of cases, due to a continuing inability to arrive at a settled definition of the term.[24]

When a rising tide of litigation and legal confusion finally provoked legislative action, the revisors not unnaturally took the problem to be one of procedural definition. They attempted to eliminate the problem by limiting diversity removal to cases involving "separate and independent claims," a device which, it was hoped, would end confusion and cut down on the volume of diversity removal litigation.[25] Although Congress was certainly aware of the provision in section 71 for allowing removal in cases where discrimination could be proven, such a provision was not included

[22] "Separable" is the operative word of § 71. Once it was satisfactorily defined, the "if-then" structure of the statute would clearly dictate the result to be reached by the courts in every case. "Separability" defied definition because the underlying purpose of the statute was ignored as its central problem came to be one of definition. What was essentially designed to be a means became the end itself.

[23] This relationship in diversity removal is often explained as follows: There are three different ways in which a plaintiff's statement of his case can be characterized. He may (1) state a single, unitary cause of action against the two defendants; (2) state a single cause of action containing "separable" controversies with each defendant; or (3) state "separate and independent" claims or causes of action against each defendant. In the first instance it is thought that the trier of fact or the state judge involved will not be able to operate to the prejudice of the out of state defendant without hurting the interests of the local defendant. In the second case, the separability of the controversy is thought to expose the stranger to the possibility of prejudice, and therefore, removal was formerly allowed under § 71. In the third case, the stranger is again exposed, perhaps even more readily, to prejudice because the action against him is so readily divorced from the action against the in state party. In the latter two cases, then, the local court could act to the prejudice of the stranger without hurting the local party. Under § 1441(c) removal is allowed only in the third instance.

[24] See 28 U.S.C. § 1441 (1964) (revisor's note).

[25] *Ibid.*

in the 1948 amendment to the Judicial Code.[26] Thus the courts are presently left with an "if-then" statement, section 1441(c), and are given no definition of the operative words related to the primary purpose of diversity removal jurisdiction. Rather the question is one which involves the "murky waters of what is a cause of action," [27] a problem difficult to relate to the questions faced in diversity jurisdiction.

In its only case construing section 1441(c), *American Fire & Cas. Co. v. Finn*,[28] the Supreme Court responded to the problem on this procedural level, delving into the pleadings to solve it without ever asking whether or not removal should have been granted to the class of defendant involved in the case. Perhaps a better description of what the Court did would be: In an attempt to implement the congressional purpose behind section 1441(c) the Court, after finding that Congress was interested primarily in reducing the volume of federal removal litigation, defined "separate and independent" in terms which would accomplish that end, and inquired no further as to the effect of this result.

Briefly, the situation in the *Finn* case was as follows: Plaintiff, having lost her house by fire, sued each of two insurance companies alleging alternative liability and, also, both insurance companies and their common local agent, alleging joint and several liability for the loss. The Court of Appeals for the Fifth Circuit thought that the complaint alleged separate and independent claims or causes of action against the insurance companies within the meaning of section 1441(c).[29] The Supreme Court reversed and remanded the case to the state court, saying in part:

> The effectiveness of the restrictive policy of Congress against removal depends upon the meaning ascribed to "separate and independent * * * cause of action" . . . .
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> In a suit turning on the meaning of "cause of action," this Court announced an accepted description. . . . This Court said, . . . :
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> "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely,

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[26] *Ibid.*:

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings . . . [of] the Civil War . . . period . . . have no place in the jurisprudence of a nation since united by three wars . . . .

[27] WRIGHT, FEDERAL COURTS 117 (1963).

[28] 341 U.S. 6 (1951).

[29] American Fire & Cas. Co. v. Finn, 181 F.2d 845 (5th Cir. 1950).

> the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."
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> [W]e conclude that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).
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> In making this determination we look to the plaintiff's pleading, which controls.[30]

Thus section 1441(c) as interpreted by the Supreme Court fails to deal with the question of whether the defendant is of the type who should be allowed to remove. All of the discussion is in terms of what the plaintiff stated or suffered. *Finn* is, at best, a mechanical description of what the proper case for removal under section 1441(c) looks like: It speaks only to *when* removal should be allowed to meet the congressional purpose, not to *why* it should be allowed to the particular defendant. Under the statute it could be no more.

Nevertheless, the courts speak as if there were a cogent policy behind *Finn* and section 1441(c), and trouble little over their application of the section except for the perennial policy statement that the section was designed to reduce the volume of federal removal cases,[31] which is to say nothing since the answer it tends to give in every case is "remand."

From the foregoing discussion it seems clear that the courts would not and now cannot deal with diversity removal jurisdiction on the basis of individually prejudiced courts. If the defendant's position is to become the focal point of consideration, so that the law may be made responsive to its premises, legislative action will be necessary. A solution which offers the courts no more than a chance to develop their own defendant focused standard will not be good enough. The history of section 71 offers an example of the futility of such a course of action. There will be a movement toward a procedural isolation of the courts from such a determination. Section 1441(c) is the fruit of such a movement.

The proposed ALI statutory revision offers an excellent and viable alternative. The proposal embodies a readily discernible policy of allowing removal only as a relief against possible discrimination in a self-defining statute—one which the courts will apply, and which the bar can argue, since Congress will bear the burden of having decided that a certain class of defendants should be allowed to remove. Counsel contending for removal need not make any imputation of a discriminatory attitude on the part of any particular court, thus avoiding the friction which would otherwise inevitably follow. Any such imputation will be vague in the particu-

[30] American Fire & Cas. Co. v. Finn, 341 U.S. 6, 12-14 (1951).

[31] *E.g.*, Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D. N.Y. 1965).

lar case, since the defendant's status as a member of a class susceptible to discrimination—a "stranger in the state"—rather than the court's attitude, is determinative.

The ALI proposals avoid the pitfall of concentrating on individual defendants in particular courts. In so doing there is, of course, an acceptance of the fact that a few unnecessary removals will be allowed.[32] There may even be cases in which removal should be allowed when it will not; but this problem cannot be remedied within the terms of a practically functioning standard.[33] Any direct concentration on the possible prejudice of an individual court seems doomed from the start, as well as being impossibly inefficient when compared with systematic classification of defendant types.

The heart of the ALI proposals is to change the diversity jurisdiction of the federal courts in such a way as to exclude all those who cannot in some sense qualify as "true" strangers in the state and to open the courts through removal or original jurisdiction to those who have a claim to federal protection from local quirks due to their status as visitors or non-participants in the political life of the state. Speaking of its proposed change the ALI has said:

> Its basic principle is that the function of the jurisdiction is to assure a high level of justice to the traveler or visitor from another state; when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system, he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the state.
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> In accordance with this principle, the most far-reaching proposal is to bar a plaintiff from the federal court in his home state. Here the most convenient alternative will usually be a state court in that state.
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> On the same basis, a corporation or other business enterprise with a "local establishment" maintained for more than two years in a state would be prohibited from invoking the jurisdiction, either originally or on removal, of a federal court in that state in any action arising out of the activities of that establishment. Similarly, a natural person would be denied access to the federal

[32] ALI STUDY 52. However, the ALI estimates that acceptance of its proposals will cause a substantial reduction in the overall number of diversity cases. *Id.* (Appendix B).

[33] It should be noted that the proposed standard is supported by a clearly defined purpose; under such a classification system it seems unlikely that the courts would fail to bring a proper borderline case under the statute. For the unusual case in which a defendant might deserve removal but be blocked by the terms of the statute, a "demonstrable prejudice" clause, similar to that of § 71, might be a safeguard.

> court in the state where he has his principal place of business or employment. These classes of persons would be barred from the federal courts as plaintiffs in the same way that citizens would be, and as defendants on removal in the same way that citizens already are. Here again the likely result is to leave in the appropriate state court cases which do not belong in the federal system.[34]

The fact that a "business resident" not a citizen should be barred from a federal forum even if the state court is arguably inadequate to hear the case does not seem harsh if it is kept in mind that: (1) profit is being derived from the association with the state; (2) the "resident" noncitizen has a certain limited opportunity to affect the condition of the state courts; and (3) his working association with the state seems to preclude discrimination against him as an outsider, since this association makes him a "visible" member of the community.

Under the ALI scheme the plaintiff's characterization of the case is of comparatively little importance, and the court is not forced to solve a sterile procedural puzzle which, once mastered, reflects no rational policy basis for its result. Section 1304, which generally defines the right of removal,[35] reads in part as follows:

> (a) Any civil action brought in a State court against a single defendant, of which the district courts have jurisdiction

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[34] ALI STUDY 2, 3.

[35] Section 1441(c) and the ALI Study's § 1304 share a common problem: they both are open to a constitutional attack which stems from the clause in both which allows the district court to acquire jurisdiction over the entire case once removal is granted. See Lewin, *supra* note 8. There is little argument as to the constitutionality of the removal if only one cause of action is involved, since this question has long been settled under the theory of pendant or ancillary jurisdiction. Texas Employers Ins. Ass'n v. Felt, 150 F.2d 227 (5th Cir. 1945). But where two causes of action are involved, one of them being nonfederal and nondiverse in nature, the question has been directly passed upon only once, in Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965). Two courts summarily rejected the argument of unconstitutionality without reaching the merits. Breslerman v. American Liberty Ins. Co., 169 F. Supp. 531 (E.D.N.Y. 1959) (court stated that in any event it would have had original jurisdiction of the case); Baltimore Gas & Elec. Co. v. United States Fid. & Guar. Co., 159 F. Supp. 738 (D. Md. 1958) (all parties desired single suit in the federal court).

The attack in *Twentieth Century-Fox* is based upon reading Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806) as a constitutionally required decision demanding complete diversity of all parties plaintiff and all parties defendant before the federal courts can obtain jurisdiction under U.S. CONST., art. III, § 2. The opinion in *Twentieth Century-Fox* was cast in two parts. The first argued that *Strawbridge v. Curtis* was a case of statutory construction, since no Supreme Court decision has ever treated it as anything more, and that § 1441(c) therefore fell within the ambit of article III, § 2, as do class actions, interpleader, and intervention suits, all of which have been found constitutionally sound, and all of which involve something less than total diversity of plaintiffs and defendants. The second argument maintained that, even assuming that article III, § 2 required complete diversity, a separate ground for allowing the operation of § 1441(c) might be found in the "necessary and proper" clause of article I, § 8, as Congress might be said to have exercised its power in this respect to spare the litigants the expense and hazards of multiple litigation resulting if the nonfederal, nondiverse elements must necessarily be remanded. The court argues that such an exercise of power would be "necessary and proper" in order to implement properly the grant of diversity jurisdiction in article III.

> founded on diversity of citizenship under section 1301 of this title, may be removed by the defendant to the district court for the district embracing the place where such action is pending unless his invocation of removal jurisdiction of that district court is prohibited by section 1302 of this title.
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> (b) Any defendant or third-party defendant who would have been able to remove under subsection (a) of this section if sued alone by any party making claim against him in the State court action may remove the entire action to the district court. Any person impleaded as a third-party defendant in the State court action, however, may not remove if . . . he and the defendant who impleaded him are both insured by the same liability insurer or stand in any relationship of employer and employee or liability insurer and insured. The district court may in its discretion remand all matters that, considered separately, would not be within its jurisdiction. Upon request made within twenty days after any such order by the party or parties who removed the action, all remaining matters shall also be remanded.[36]

The proposed section makes it clear that the relationship of the defendant to the state in which the court is sitting is the crucial factor in determining whether removal should be allowed. This is done by means of the plug in to section 1302, the relevant sections of which follow:

> (a) No person can invoke . . . [diversity] jurisdiction, either originally or on removal, in any district in a State of which he is a citizen.
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> (b) No corporation incorporated or having its principal place of business in the United States, and no partnership, unincorporated association, or sole proprietorship having its principal place of business in the United States, which has and for a period of more than two years has maintained a local establishment in a State, can invoke that jurisdiction, either originally or on removal, in any district in that State in any action arising out of the activities of that establishment.[37]

The ALI offered the following reason for the first sentence in section 1304, which allows a defendant who is eligible to remove under sections 1301 and 1302[38] to do so with nearly complete freedom:

> Once the availability of diversity jurisdiction is limited to those "true" out-of-staters who are actually deserving of the protection,

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[36] ALI STUDY 15, 16.

[37] *Id.* at 11; see Appendix to this Comment for complete text, including a definition of "local establishment."

[38] *Id.* at 8-12; see Appendix to this Comment for complete texts.

> the access of such persons to a federal forum should be as unhindered as possible. Thus, existing restrictions which prevent removal of a state court action to a district court because of the joinder of other parties not themselves qualified to remove, or for other similar reasons, should be abrogated.[39]

The ALI strongly intimates that the original reasons for the grant of diversity jurisdiction are lost in the past,[40] and at best, the explanations commonly given are conjectures based on the intrinsic nature of diversity jurisdiction and uncertain historical material. Therefore, the ALI proposal sets up a self-contained scheme by which the form of the statute dictates its content, including policy—a content consistent with, but not dependent upon, outside historical material or justification. The federal interest in the litigation is clearly defined—to prevent possible discrimination in the state courts against the true stranger in the state—thereby justifying the direct exercise of federal power in depriving the state courts of jurisdiction.

The proposed statute, like sections 71 and 1441(c), is in the form of an "if-then" statement. But, unlike its predecessors, it goes on to define all of the operative words within the statutory scheme, so that the courts in interpreting a particular provision need not be entirely dependent upon judicial instinct in order to carry out the statutory purpose. A study of the various defining clauses [41] and an analysis of their effect should provide a very clear notion of the underlying policy objectives of the statute. This means that the courts will be governed by principles directly related by the statute to the problem of diversity removal jurisdiction, and they will not have to fall back upon solutions worked out in connection with other problems, as they did with section 1441(c) in order to define a "separate and independent cause of action."

Although section 1304 is very similar to section 71, at least insofar as the result sought in allowing removal of certain types of actions, the ALI provision is superior not only in being self-defining, but also in that it employs a direct attack upon the central issue. Unlike sections 71 and 1441(c), section 1304 looks directly at the defendant, and the operative words are in terms which describe the defendant's position.[42] This change along with the addition of the definitive clauses should render section 1304, if adopted, a source of much less litigation than its predecessors.

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[39] ALI STUDY 55.

[40] *Id.* at 48-49.

[41] See Appendix to this Comment for complete text.

[42] *Ibid.*

APPENDIX.

§ 1301. General diversity of citizenship jurisdiction; amount in controversy; costs

(a) Except as provided in this section and section 1302 of this title, the district courts shall have jurisdiction, originally or on removal, of any civil action between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; or

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

(b) For the purposes of this section and section 1302 of this title:

(1) A corporation shall be deemed a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business.

(2) A partnership or other unincorporated association capable of suing or being sued as an entity in the State in which an action is brought shall be deemed a citizen of the State or foreign state where it has its principal place of business, whether such action is brought by or against such partnership or other unincorporated association or by or against any person as an agent or representative thereof.

(3) In any direct action by a person other than the insured against the insurer on a policy or contract of liability insurance, such insurer, whether incorporated or unincorporated, shall be deemed a citizen of the State of which the insured is a citizen, as well as of every State and foreign state by which the insurer has been incorporated and of the State or foreign state where it has its principal place of business.

(4) An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same State as the decedent; and a guardian, committee, or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the person represented.

(c) The word "State", as used in this chapter, includes the District of Columbia, the Commonwealth of Puerto Rico, and any Territory or Possession of the United States.

(d) When a plaintiff who files an action originally in the district court asserting jurisdiction under this section is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(e) Notwithstanding any other provision of this title, whenever an action brought by or on behalf of any person is within the jurisdiction of the district courts under subsection (a) of this section, jurisdiction in that action shall also extend to any claim against the same defendant if such claim (1) is brought by such person on his own behalf or by or on behalf of any member of his family living in the same household as such person and (2) arises out of the transaction or occurrence that is the subject matter of the action.

(f) No district court shall have jurisdiction under this section of any civil action arising under the workmen's compensation laws of any State.

§ 1302. General diversity of citizenship jurisdiction; exceptions

The jurisdiction of the district courts under section 1301 of this title shall be subject to the following exceptions:

(a) No person can invoke that jurisdiction, either originally or on removal, in any district in a State of which he is a citizen.

(b) No corporation incorporated or having its principal place of business in the United States, and no partnership, unincorporated association, or sole proprietorship having its principal place of business in the United States, which has and for a period of more than two years has maintained a local establishment in a State, can invoke that jurisdiction, either originally or on removal, in any district in that State in any action arising out of the activities of that establishment.

The term "local establishment" as used in this subsection means a fixed place of business where or in connection with which, as a regular part of such business: (1) services are rendered or accommodations furnished to persons within the State; (2) sales, delivery or distribution of goods are made to persons within the State by one regularly maintaining a stock of goods or a showroom for the display of samples within the State; (3) sales of insurance, securities, or other intangibles, or of real property or interests therein, are made to persons within the State; or (4) production or processing takes place. Dealings carried on through an independent commission agent, broker, or custodian do not give rise to a local establishment.

The provisions of this subsection shall apply only to entities organized or operated primarily for the purpose of conducting a trade, investment, or other business enterprise.

(c) No individual citizen of the United States who has and for a period of more than two years has had his principal place of business or employment in a State can invoke that jurisdiction, either originally or on removal, in any district in that State.

(d) No person can invoke that jurisdiction, either originally or on removal, in any circumstances in which that person, or an individual whose interests or estate that person represents, would have been barred under subsections (b) or (c) of this section from doing so at the time the defendant's acts or omissions giving rise to the claim occurred.

§ 1304. General diversity of citizenship jurisdiction; removal of actions brought in State courts

(a) Any civil action brought in a State court against a single defendant, of which the district courts have jurisdiction

founded on diversity of citizenship under section 1301 of this title, may be removed by the defendant to the district court for the district embracing the place where such action is pending unless his invocation of removal jurisdiction of that district court is prohibited by section 1302 of this title.

(b) Any defendant or third-party defendant who would have been able to remove under subsection (a) of this section if sued alone by any party making claim against him in the State court action may remove the entire action to the district court. Any person impleaded as a third-party defendant in the State court action, however, may not remove if, with respect to the claims made against them, he and the defendant who impleaded him are both insured by the same liability insurer or stand in any relationship of employer and employee or liability insurer and insured. The district court may in its discretion remand all matters that, considered separately, would not be within its jurisdiction. Upon request made within twenty days after any such order by the party or parties who removed the action, all remaining matters shall also be remanded.

(c) A counterclaim asserted in a State court shall be deemed an action for the purposes of this section and may be removed by a plaintiff in the State court action if as a defendant he would have been able to remove under subsection (a) or (b) of this section. A third party impleaded on such a counterclaim may remove if he would have been able to remove if impleaded as a third-party defendant under subsection (b) of this section. When the counterclaim arises out of the same transaction or occurrence as the plaintiff's claim in the State court, the entire action shall be removed; otherwise, the counterclaim shall be severed and separately removed.

(d) When a party would be barred from removing an action in a State court under this section solely because the amount claimed against him in the State court action is insufficient to satisfy jurisdictional requirements, he may remove the action for the purpose of asserting in the district court a claim which he has against another party arising out of the same transaction or occurrence as the claim against him and in which the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs. A statement of the proposed claim shall be included in any petition for removal under this subsection.